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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

Rachel Martinez-Brandt
and Mark Brandt
Petitioners

vs.

GYGAX REALTOR, et al.
Respondents

On Petition for a Writ of Certiorari
To the Court of Appeal of the
State of California

Petition for a Writ of Certiorari

Rachel Martinez-Brandt
and Mark Brandt
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109 pp

1. Do Plaintiffs in a State civil law suit alleging Fraud have a right to a trial where they have won but rejected an arbitration award from the Defendants and they seek a trial on the merits ?

2. Did State Court Judge's refusal to accept moving papers asking court to set a trial date create a Constitution for the United States of America, Amendment VII violation where Court Clerk never refused the moving papers and did file them 104 days after she received them despite Judge's previous ruling not to; where a statutory period expired during the filing delay that allowed the Defendants to move for dismissal based on a failure to prosecute; where the filing date stamped on the face of Plaintiffs' affidavit in the courthouse case file erroneously showed the affidavit and moving papers were submitted to court after the deadline had expired; and where the judge may also have acted with prejudice when he imposed monetary sanctions on Plaintiffs, who submitted papers in propria persona, although their Attorney was present at hearing ?

LIST OF PARTIES

Rachel Martinez-Brandt and Mark Brandt
3306 Red Cedar Terrace
Fremont, California 94536
(510) 793-2528
Petitioners, Pro se

v.

Gygax Realtor, et al.
Respondent

Superior Court of the
State of California,
County of Alameda, Southern Division
Civil Case No. #H 153813-3
Respondent Court

Court of Appeal of the
State of California, 1st Dist., Div. 4
Appellate No. #A075317, #A076285
Respondent Court

Supreme Court of the State of California
Appellate No. #S064014
Respondent Court

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CITATIONS

January 12, 1996:
Alameda County Superior Court
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Minute Order imposing monetary sanctions against plaintiffs in the amount of $250.00 "for failure to participate and make this a meaningful court hearing".

June 21, 1996:
Alameda County Superior Court
Case #H 153813-3,
Minute Order Granting Defendant Gygax Realtor's motion to dismiss "for failure to bring the case to trial within five years".

September 10, 1996:
Alameda County Superior Court
Case #H 153813-3,
Court Order Granting Defendant's motion to determine prevailing party and fix attorney's costs at $33,815.50.

July 23, 1997:
Court of Appeal of the State of California, 1st District, Division 4:
Opinion of the Court of Appeal,
"Not to be Published ..."
Appellate Numbers #A075317, #A076285

August 19, 1997:
Court of Appeal of the State of California, 1st District, Division 4:
"The petition for rehearing is denied."
Appellate Numbers #A075317, #A076285

October 1, 1997:
Supreme Court of California:
"Petition for review DENIED."
Appellate Number #S064014

December 12, 1997:
Supreme Court of the United States:
Application #A-432 Extension of time to file a Petition for Writ of Certiorari,
Granted on December 12, 1997,
By Justice O'Connor.
Time extended to January 29, 1998.
Application #A-432

JURISDICTIONAL BASIS

Petitioners seek review of the following decisions:

January 12, 1996..... ruling by the Superior Court of the State of California, County of Alameda, Case #H 153813-3:

Ruling that Petitioners' Affidavit and supporting papers asking the court to set a trial date and invoking U.S.C.A. Const. Amend. VII as the authority are not acceptable for filing; and the ruling imposing monetary sanctions against the Petitioners who submitted papers in propria persona.

June 21, 1996..... ruling by the Alameda Co. Sup. Ct., Case #H 153813-3:

Granting the Defendant's motion dismissing the case "for failure to bring the case to trial within five years".

September 10, 1996..... ruling by the Alameda Co. Sup. Ct., Case #H 153813-3:

Granting the Defendant's motion to

determine prevailing party and ordering the Petitioners to pay Defendant's attorney fees amounting to $33,815.50.

July 23,1997..... ruling by the Court of Appeal of the State of California, Appellate Numbers #A075317, #A076285:
Affirming the Dismissal of Alameda County Superior Court Case #H 153813-3.

August 19, 1997..... ruling by the Court of Appeal of the State of California, Appellate Numbers #A075317, #A076285:
"The petition for rehearing is denied."

October 1, 1997..... ruling by the Supreme Court of State of California, Appellate #S064014:
"Petition for review denied."

On December 12, 1997 an extension of time (#A-432) to file a Petition for a Writ of Certiorari was granted by Justice O'Connor, extending the time to and including January 29, 1998. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C.A. §1254(1).

TABLE OF AUTHORITIES

California Code..... Page 19, 22
Civil Procedure §583.310:

"An action shall be brought to trial within five years after the action is commenced against the Defendant."

California Code..... Pages 23-24
Civil Procedure §583.340:

"In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

(a) The jurisdiction of the court to try the action was suspended.

(b) Prosecution of the action was stayed or enjoined.

(c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile."

California Code..... Page 23
Civil Procedure §583.360:

"(a) An action shall be dismissed by the court on it's own motion or on the

motion of the Defendant, after notice to the parties, if the action is not brought to trial within the time prescribed in this article.

(b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute."

Hoffman v. United States..... Page 29
244 Federal Reporter, 2nd Series 378

Scafidi v. Western Building..... Page 31
& Loan Company (1946)
72 California Appellate Reports,
2nd Series 550, 572
165 Pacific Reporter 260

Traguth v. Zuck..... Page 28
710 Federal Reporter, 2nd Series 90, 95

United States v. Hough..... Page 28
157 Federal Supplement 771

Preamble of the Constitution.... Page 32
for the United States of America:

"We the people of the United States, in order to form a more perfect union,

establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

Constitution for the ..... Page 33
United States of America, Amendment V:

"No person shall ... be deprived of life, liberty, or property, without due process of law ..."

Constitution for the ..... Page 33
United States of America, Amend. VII:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved ..."

Constitution for the ..... Page 33
United States of America, Amendment IX:

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Constitution for the ..... Page 33
United States of America, Amend. XIV:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it's jurisdiction the equal protection of the laws."

Constitution of the ..... Page 34
State of California, Article I, §1:

"All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

Constitution of the ..... Page 34
State of California, Article I, §7:

"A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws ..."

Constitution of the ..... Page 34
State of California, Article I, §16:

"Trial by jury is an inviolate right and shall be secured to all, ... In a civil case a jury may be waived by the consent of the parties expressed as prescribed by statute."

Constitution of the ..... Page 35
State of California, Article III, §1:

"The State of California is an inseparable part of the United States of America, and the United States Constitution is the Supreme Law of the land."

INTRODUCTION

This Petition for a Writ of Certiorari is made by Petitioners in propria persona. Petitioners apologize for here and now for the faults in this Petition and do their best to set down the facts:

This case concerns a civil lawsuit in State court for Fraud and Breach of Contract where the Petitioners were the Plaintiffs, represented by an Attorney, and had won an arbitration award against the Defendants. Petitioners sought a trial on the merits by filing an affidavit, made in propria persona, asking the court to set a trial date, invoking the Constitution for the United States of America, Amendment VII.

A judge made a ruling where he refused to accept the Petitioners' Affidavit for filing the day after the Court Clerk received it. The judge imposed monetary sanctions against the Petitioners and claimed to be ignorant of the Seventh Amendment.

A delay of 103 days followed, then the Court Clerk filed the affidavit, despite the judge's earlier refusal.

During the filing delay a statutory deadline had passed. This allowed the Defendants to successfully move for a dismissal based on a failure by the Petitioners to bring the matter to trial within a five year period. The Petitioners' Affidavit asking the court to set the matter for trial was not filed by the court until after the statutory deadline had expired.

The Defendants' motion to dismiss was made before a judge who had never heard the case before. The was nothing in the official record to indicate that the Petitioners' Affidavit had actually been received by the Court Clerk 63 days before the expiration of the five year period or that the previous judge may have acted with prejudice against the Petitioners. The Defendants' motion to dismiss was granted and they were subsequently awarded $33,815.50 in attorney's fees payable by the Petitioners.

STATEMENT OF FACTS

This case is a civil lawsuit from the State of California resulting from the purchase of a house and real property by the Petitioners in August of 1990. Petitioners, represented by an Attorney, brought a suit against the Seller on March 15, 1991, alleging Fraud and Breach of Contract.

After deposing the Seller, the Petitioners' Attorney advised them to settle with the Seller, who was willing to rescind a note with an unpaid balance of $22,000.00 and bearing an interest rate of 11½% in order to be dropped from the lawsuit.

Petitioners' Attorney told them that based upon the Seller's statements made at deposition he would name the Realtors to the lawsuit, and that the Realtors were more culpable for the Fraud and Breach of Contract than Seller, who had acted at the direction of the Realtors.

Petitioners' Attorney instructed that settlement with the Seller was a sound tactic because if a larger settlement was won against the Seller they would

declare bankruptcy and the Petitioners would be unable to collect against them; and that Petitioners' Attorney needed to call the Seller as a witness against the Realtors at trial, so it would be best to keep the relationship positive in order to ensure the Seller's cooperation. Following their Attorney's advice the Petitioners settled with the Seller on November 4, 1992 for cancellation of the note described above.

The Realtors were then named to the lawsuit. The Petitioners won an arbitration award against the Realtors in the amount of $18,500.00 on November 21, 1994. Petitioners rejected the arbitrator's award because it was insufficient to cover the cost of repairs necessary to the property.

On January 6, 1995 Petitioners' Attorney requested a Trial De Novo. On January 12, 1995 a Stipulation and Order was filed to allow for the tardy submission by the Petitioners' Attorney, who never received notice of the arbitrator's award.

The arbitrator's award was erroneously entered as a judgment on January 25, 1995. This caused a procedural delay of approximately 60 days before it was resolved by the court.

A trial date was set for July 21, 1995. Depositions of the Realtors and the Petitioners took place in June.

At a pretrial conference on July 7, 1995 the Petitioners' Attorney emphatically told them to vacate the trial date so that expert witnesses from both sides could conduct an additional inspection of the property. Petitioners followed the advice in good faith. The inspection was done on July 14, 1995.

Trial setting conferences were held on August 18th and October 27th with no resolution and no trial date set. The matter was further continued until January 12, 1996.

Petitioners incurred over $4,000.00 in expenses from July to December 1995 for engineering costs and to have architectural drawings made.

In January 1996 Petitioners were notified by the plan checkers at the local Building Inspection Department of

Zoning Law violations that would require the removal of structures that were existing and represented as having been done with proper permits, inspected, and in compliance with building codes and zoning regulations when Petitioners purchased the property.

It had been discovered hazardous materials including asbestos were present and would be disturbed during construction. The more money Petitioners spent the further away a resolution of the case seemed, but the facts and evidence of fraud were in Petitioners favor.

Petitioners were aware of multiple building code violations, including structural problems, electrical and plumbing code. Some of the structural modifications were concealed and the extent of repairs could not be determined without first opening up walls or removing sub-flooring.

At this point the litigation had been ongoing for 4 years and 10 months without a resolution. Petitioners had borne two children since moving into the home and were concerned that building

code violations resulted in unsafe conditions that could lead to injury of their children, aged 1 year and 4 years old. Petitioners did not wish to occupy house during construction repairs.

Petitioners were aware that the Realtors made statements that were inconsistent with the facts [they lied] in their depositions. Because of inconsistencies in the separate depositions of the opposing parties between their stories and documents in the case they would have credibility problems at trial.

Petitioners' Attorney seemed unresponsive to the situation, and was unable to get the matter set for trial at this point in the proceedings.

This led Petitioners, who [obviously] have no legal training, to take it upon themselves to ask the court for a trial date to be set.

Petitioners made their best effort to prepare documents with proper captions for the court, using the proper form, and authored papers entitled: "Notice of Intent to Invoke Constitutional Rights", "Affidavit in Support of Intent to Invoke

Constitutional Rights", and "Points and Authorities in Support of Intent to Invoke Constitutional Rights" (herein after referred to collectively as: Petitioners' Affidavit) that briefly recounted the details described above and asked the court to set a trial date in the case invoking Amendment VII of the Constitution for the United States of America as the authority.

On January 11, 1996, the day before the next scheduled trial setting conference, the Petitioners submitted to the Court Clerk in Department 40 the Petitioners' Affidavit they had drafted in propria persona, asking that the court to set the matter for trial. The Court Clerk accepted the Petitioners' Affidavit and returned copies to the Petitioners that are stamped as "ENDORSED FILED JAN 11 1996".

(See the Appendix at Pages 68, 71, 75)

At the trial setting conference held on January 12, 1996 the judge refused to accept the affidavit and supporting papers for filing. The judge made the following statements concerning the Petitioners' Affidavit:

> "The documents that he's offered, he hasn't filed, I haven't accepted them for filing, but I've received them. He wants a trial date pursuant to the Seventh Amendment of the U. S. Constitution. Now I don't know what the hell he's talking about and neither does he."

(See the Reporter's Transcript of the Proceedings held on January 12, 1996, at the Appendix on Page 83, lines 1 - 7)

> "I just marked it received. It wasn't filed."

(See Reporter's Transcript of January 12, 1996, at the Appendix on Page 84, lines 8 through 10)

> "And for making this process today useless both for the court and counsel, the plaintiffs are assessed $250.00 in sanctions to be payable within 10 days. That money is to be paid to the Defendant's counsel."

(See the Reporter's Transcript of the proceedings held on January 12, 1996, at Appendix on Page 86, lines 6 through 11)

The matter was continued from January 12th to March 1st on the court's motion.

On January 16, 1996 the Petitioners commissioned a transcript of the hearing from the Court Reporter by letter with an agreed upon deposit check also enclosed. (See Appendix at Page 89, 90)

On January 22, 1996, Defendants' Attorneys were served with the Petitioners' Affidavit at their offices along with the $250.00 sanction award from the January 12th hearing.

Before the March 1st hearing the Petitioners' Attorney advised them the judge was reacting in an adverse manner towards one of them, and that person should not attend the March 1st hearing.

On the March 1st hearing Attorneys for both parties were present. The judge set the matter for trial on July 12, 1996. (See Appendix at Page 63, 65; The March 01, 1996 Minute Order)

Petitioners' Attorney may have made an error by not getting a stipulation from the Defendants' Attorney agreeing to a date that was later than the 5 years specified in California Code of Civil Procedure §583 (herein after referred to as: CCP §583) or raise any objection to the trial date being set

beyond the statutory five year period that was to expire on March 15, 1993.

On March 12, 1996 the Reporter's Transcript (of the January 12, 1996 hearing) was completed. On March 14, 1996 the payment for the transcript went through the Petitioners' bank .

The Reporter's Transcript was not filed in the case until January 1997, when it was filed with the Court of Appeal of the State of California after the case had already been dismissed by the original court.

On March 15, 1996 the five year anniversary of the case passed. The March 15, 1996 statutory deadline was triggered by the filing of the complaint in the lawsuit by the same Petitioners' Attorney who continuously represented Petitioners from the beginning of litigation and through out the appeal process in California State Courts.

The case was still set for trial to begin on July 12, 1996. Petitioners were not aware nor did their Attorney ever advise them that the case must be brought to trial or face dismissal within a statutory deadline.

Petitioners believed they had a legitimate trial upcoming and looked forward the resolution of the case.

On April 25, 1996 Petitioners' Affidavit was stamped and filed by the Court Clerk. (See Appendix at Pages 91, 94, 99; Note: "FILED APR 25 1996")

Petitioners' Affidavit had been received by the Clerk on January 11, 1996, but was not filed based on a judge's refusal of the documents at the January 12, 1996 hearing. It has never been determined by what authority, apparently overruling the previous refusal, the Court Clerk did file the Petitioners' Affidavit on April 25, 1996. To this date no court has conceded there was a delay in filing the Petitioners' Affidavit, or made a ruling on how that delay and the sanctions imposed may have affected this case.

Defendant's motion for dismissal was made to a judge who was hearing the case for the first time.

Petitioners allege the record was deficient and misleading to the new judge where there was nothing in the record to indicate that, contrary to the

Court Clerk's official stamp stating "FILED APR 25, 1996" on the Petitioners' Affidavit, the Petitioners actually had submitted their request for the court to set a trial date in a timely manner before the expiration of the statutory deadline imposed by CCP §583 (March 15, 1996) and not after the deadline had passed, as the late filing date stamped on the Petitioners' Affidavit erroneously indicated.

Additionally, the Reporter's Transcript of the January 12th hearing was not in the courthouse file for the new judge to examine although the transcript had been finished and paid for 98 days prior to the hearing on the Defendants' motion to dismiss.

Petitioners allege they were diligent in their efforts to get a trial date set and establish a record of the January 12, 1996 hearing. That the Reporter's Transcript was not on file for the judge ruling on the Defendants' dismissal motion to examine is through no the lack of diligence by the Petitioners.

On June 21, 1996 the new judge granted the Defendants' motion to dismiss (See Appendix at Page 57, 59; Minute Order dated June 21, 1996, Case #H 153813-3). The dismissal occurred pursuant to CCP §583.360:

> "(a) An action shall be dismissed by the court on it's own motion or on the motion of the Defendant, after notice to the parties, if the action is not brought to trial within the time prescribed in this article.
>
> (b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute."

At CCP §583.340 the exceptions are expressly provided. CCP §583.340:

> "In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:
>
> (a) The jurisdiction of the court to try the action was suspended.
>
> (b) Prosecution of the action was stayed or enjoined.

(c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile."

Petitioners contend CCP §583.340(c) applies in this case where the judge imposed sanctions on the Petitioners when they asked for a trial date on January 12, 1996 and refused to accept Petitioners' Affidavit for filing, creating a filing delay of 104 days.

On September 10, 1996 an order was filed in the case awarding the Defendants costs and attorney's fees of $33,815.50 to be paid by the Petitioners (See Appendix at Page 60, 62; "Order Granting Defendant' Motion ... Fees Awarded")

On August 15, 1996 Petitioners did advise their Attorney of the discrepancy involving the filing of the Petitioners' Affidavit which they discovered while examining the courthouse file on their own. Petitioners did ask that Petitioners' Attorney raise the issue in the appeal that he planned to file against court's ruling on dismissal.

The appeal mentions the Petitioners' Affidavit and the hearing of January 12, 1996 as follows:

> "On January 11, 1996, the plaintiffs and appellants herein without notice to their counsel filed a notice of motion to exercise constitutional rights and demand a jury trial along with a declaration and points and authorities. A hearing was held and the motion was denied and plaintiffs below and appellants herein were personally sanctioned $250.00."
>
> "Further, the effort of the plaintiffs below and appellants herein to have the matter set for trial on January 12, 1996 met with complete denial by the case management court which had to authorize the setting of any trial date."
>
> "On March 1, 1996 the action was set for trial and jury trial waived by both parties."

Petitioners' Attorney cannot claim to be ignorant of the Petitioners fervent desire to have a trial on the merits after January 12, 1996. A review of the Reporter's Transcript of January 12, 1996 shows that in fact no ruling was made on the Petitioners' request for a trial date to be set. The judge hearing

the case refused to accept Petitioners' Affidavit for filing and imposed monetary sanctions. (See the Appendix at Page 53, 54, 55; Minute Order imposing $250.00 sanctions on Plaintiffs)

At the January 12, 1996 hearing the Petitioners' Attorney was present and spoke on the record. When monetary sanctions were levied against the Petitioners in propria persona Petitioners' Attorney made no attempt to diffuse the situation or raise any objections on the Petitioners' behalf.

On November 4, 1997 the Petitioners' Attorney made a sworn declaration that states in part:

> "During the case management phase of this case, Judge William Dunbar exhibited a strong dislike for my client Mark Brandt which affected the way he treated Mr. Brandt and this case.
>
> I declare under penalty of perjury, pursuant to the laws of the State of California, that the foregoing is true and correct."

(See Appendix Pages 101, 102; November 4, 1997 Declaration of Joseph R. Faria).

Alas, an ounce of prevention is worth a pound of cure. Instead of advising one of his clients not to attend the

March 1, 1996 court hearing because of hostility exhibited by the judge, Petitioners' Attorney should have been seeking to have the matter heard before a judge who would not exhibit any bias against the parties involved.

Petitioners contend that Due Process of Law demands a fair and impartial judge. When a judge exhibits a strong dislike for a citizen and imposes monetary sanctions on the individual the Attorney representing the citizen has a responsibility to request a different judge. Justice is not served in a courtroom where a party is intimidated from attending hearings through fines or sanctions by a biased or contemptuous judge.

Petitioners contend that their case has merit and cite the fact that they settled with one Defendant for $22,000.00 and won an arbitration award against the others.

Petitioners contend that the Petitioners' Affidavit was not deficient on it's face. No reason has ever been cited for the judge's refusal to file the Petitioners' Affidavit.

Petitioners contend pleadings by petitioners acting in propria persona are to be liberally construed so that a meritorious case is not lost due to a lack of legal skill. The following rulings are applicable to the circumstances of this instant action:

> "Implicit in the right to self representation is an obligation on the part of the court to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training."
> [Traguth v. Zuck 710 F.2d 90, at 95]

> "Where a petitioner appears in propria persona court itself undertakes to insure that no meritorious case is lost because of lack of legal skill, and technical compliance with rules of court is not stringently enforced."
> [U.S. v. Hough 157 F. Supp. 771]

> "The appellant appears here in propria persona. Although he sets forth his views on the merits with force, his briefs reflect the unfamiliarity with legal principals and procedures that so often marks and handicaps the layman counsel. But where no trained advocate is present - and this situation generally arises

> in criminal proceedings - the court itself undertakes to assure the litigant that no meritorious case be lost because of a lack of legal skill. Briefs are scanned with unjaundiced eyes and technical compliance with the Rules of Court is not stringently enforced. The dominant theme is liberality."

[Hoffman v. United States 244 F.2d 378, at 379]

Petitioners' Affidavit was submitted to the court in a timely manner that would have allowed the court to set the matter for trial if it wished to.

The Court Clerk never refused the Petitioners' Affidavit and did eventually file it despite the judge's previous refusal to.

During the delay the court was in continuous possession of the papers. The documents were not amended in any way, nor were they resubmitted to the court for a second approval.

There is no record of any hearing or other action in the case that occurred on the date when the papers were filed.

During the delay period the statutory five year period under which the case

was dismissed did run out. Because of the expiration of the five year period the Defendants successfully moved for a dismissal based on a failure to prosecute.

No court has ever made a ruling on, or acknowledged in any way, the refusal of the judge to file the Petitioners' Affidavit asking the court to set the matter for trial. Petitioners contend that if the delay was the fault of the court then the delay period should be tolled from the five year period.

Petitioners contend they have been diligent in their efforts to obtain a trial in this civil case, and that due to acts and omissions by the Officers of the State Court their right to Due Process of Law has been violated where they have been denied a trial on the merits of this case in State court.

On December 1, 1997 a Remittitur of Record was issued from the Supreme Court of the State of California awarding costs on appeal to the Defendants in this case. This is in addition to the award of $33,815.50 that was made to the Defendants on September 10, 1996.

(See the Appendix at Pages 57, 59, 60, 61, 62; Minute Order and Order Granting Defendant's Motion to Determine Prevailing Party and to Fix Amount Attorney's Fees Awarded as Costs)

Petitioners ask the court to consider the words of the Honorable Raymond E. Peters, May God Bless His Soul, in his Dissenting Opinion in the case of Scafidi v. Western Loan & Building Co. :

> "The fundamental thought behind the modern rules is that a lawsuit is not a game, where the spoils of victory go to the clever and technical regardless of the merits, but a method devised by society to settle peaceably and justly disputes between litigants. The rules of the contest are not an end in themselves. Unless the rules tend to accomplish justice the rules should be discarded. It must not be forgotten that behind each lawyer is a client, and that it is the client's rights that are involved, not those of the lawyer."

[Scafidi v. Western Loan & Building Co. (1946) 72 Cal.App.2d 550, at 572; 165 Pac.Rptr.2d 260]

Through the circumstances of this lawsuit the Petitioners are in a posi-

tion where they have been defrauded in the initial real estate purchase, they have lost the home that they invested their life's savings into, and now they will have an insurmountable (for them) debt for the legal expenses of the very Realtors who cheated them.

Petitioners contend that this situation arises from acts of prejudice by and the omissions of the Officers of the State Courts and that the case justifies review by this Court. Petitioners pose the following question for review by this Court:

Considering the fact that when the Founding Fathers of our nation wrote the Constitution they listed items in order of importance, and that in the Preamble they wrote the words "in order to form a more prefect union, establish justice", and considering the Constitutional provisions listed below, have the rulings of the State Courts of California established justice in this case ?

The Preamble of the Constitution for the United States of America:

"We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

Constitution for the United States of America, Amendment V:

"No person shall ... be deprived of life, liberty, or property, without due process of law ..."

Constitution for the United States of America, Amendment VII:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved ..."

Constitution for the United States of America, Amendment IX:

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Constitution for the United States of America, Amendment XIV:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it's jurisdiction the equal protection of the laws."

Constitution of the State of California, Article I, §1:

"All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

Constitution of the State of California, Article I, §7:

"A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws ..."

Constitution of the State of California, Article I, §16:

> "Trial by jury is an inviolate right and shall be secured to all, ... In a civil case a jury may be waived by the consent of the parties expressed as prescribed by statute."

Constitution of the State of California, Article III, §1:

> "The State of California is an inseparable part of the United States of America, and the United States Constitution is the Supreme Law of the land."

And further considering the circumstances of this case would it not be within the power and proper authority of the Supreme Court of the United States of America to remand this case back to the State of California from which it comes and command them to decide on the facts of the case involving the delay in filing the Petitioners' Affidavit asking for a trial date to be set, if this Court rules that the Petitioners, in propria persona, have failed to properly raise questions before this Supreme Court ?

VERIFICATION

I, the undersigned Petitioner, do hereby solemnly swear and subscribe that the foregoing statements made in this Petition for a Writ of Certiorari are within my personal knowledge and are true to the best of my knowledge, under the penalty of perjury, according to the laws of the United States of America.

Sworn and Subscribed to as Truth:

Rachel Martinez-Brandt, Petitioner

Mark Brandt, Petitioner

Signatures Witnessed by:

Margo Rohan

Edward Rohan.

On March 20, 1998, at Fremont, Calif.

PETITIONERS' APPENDIX

FILED; Court of Appeal, July 23, 1997, Ron D. Barrow, Clerk, By:

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA - FIRST APPELLATE DISTRICT

DIVISION FOUR

MARK BRANDT et al.,

Plaintiffs and Appellants,

v.

GYGAX REALTOR et al.,

Defendants and Respondents

A075317, A076285

(Alameda County

Super. Ct. No. H 153813-3)

Mark Brandt and Rachel Brandt (collectively "Brandt") appeal the dismissal of their complaint against

respondents Gygax Realtor and Jack Court (collectively "Gygax"). The complaint was dismissed under the diligent prosecution statute, Code of Civil Procedure section 583.310. We conclude that there was no abuse of discretion and affirm the dismissal.

I. FACTS

This action arises from Brandt's purchase of a residence in July 1990. On March 15, 1991, Brandt sued Beverly Sweesy, the seller, and Does 1-20, for breach of contract and fraud. Brandt then settled with Sweesy.

On November 4, 1992, Brandt identified Sweesy's real estate agent Jack Court and Gygax Realtor, as Doe defendants. Brandt rejected an arbitration award of $18,500, and on January 6, 1995, asked for trial de novo. Trial was scheduled for July 21, 1995, but this date

was vacated based upon Brandt's conditional offer of settlement pending an estimate of the cost of repair of the residence.

During a status conference on March 1, 1996, and prior to expiration of the five year period, the court assigned a trial date of July 12, 1996. Neither Gygax nor their attorneys expressly stipulated to extend or waive section 583.310, which requires trial within five years of commencement of an action.

On March 15, 1996, the five year anniversary passed. Thereafter, Gygax successfully moved to dismiss under section 583.310.

II. DISCUSSION

Brandt appeals asserting waiver, estoppel, and the "impossible, impracticable, or futile" exceptions to the five year rule. This court applies the

abuse of discretion standard of review to the trial court's dismissal under section 583.310. (Coe v. City of Los Angeles (1994) 24 Cal. App. 4th 88, 92.)

A. The Diligent Prosecution Requirement

Section 583.310 reads: "An action shall be brought to trial within five years after the action is commenced against the defendant."

This requirement serves two purposes: first, to discourage stale claims, preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared; second, to compel reasonable diligence in the prosecution of actions, thereby expediting the administration of justice. (Ferk v. County of Lake (1988) 205 Cal. App. 3d 268, 278-279.)

Thus, the case law clearly places the burden on plaintiffs, not the defendant or

the court, to properly calculate the statutory period, request a trial date that is before the five-year period, and object to any court assignment of a trial date beyond the five-year period. (See, e.g., Lee v. Park (1996) 43 Cal. App. 4th 305, 309; Baccus v. Superior Court (1989) 207 Cal. App. 3d 1526, 1532; Hill v. Bingham (1986) 181 Cal. App. 3d 1, 10-11.)

For Doe defendants, the five-year period is calculated from the date the original complaint is filed. (Gray v. Firthe (1987) 194 Cal. App. 3d 202, 209.) Here, the complaint was filed March 15, 1991; therefore, Brandt's action should have been brought to trial by March 15, 1996, unless any exceptions apply.

B. "Impossible, Impracticable, or Futile" Exception

Section 583.340 provides that the five-year calculation excludes the time during which, inter alia, bringing the

action to trial was "impossible, impracticable, or futile." (§ 583.340, subd. (C).) Brandt contends that the trial court should have excluded the period of time that settlement discussions were held from the five-year calculation.

What is impossible, impracticable, or futile must be determined in light of all the circumstances in the individual case, including the parties' acts and conduct and the nature of the proceedings themselves. (Moran v. Superior Court (1983) 35 Cal. 3d 229, 238; Hill v. Bingham, supra, 181 Cal. App. 3d at p.6.) Section 583.340 codifies the prior case law, and must be interpreted liberally, consistent with the policy favoring trial on the merits. (Baccus v. Superior Court, supra, 207 Cal. App. 3d at p. 1532.)

However, plaintiff's failure to monitor the crucial dates does not constitute a cause beyond the plaintiff's

control so as to trigger the application of the impossible, impracticable, or futile expectations. (Wilcox v. Ford (1988) 206 Cal. App. 3d 1170, 1175.) Delay caused by ordinary incidents of proceedings, like disposition of demurrer, amendment of pleadings, and the normal time of waiting for a place on the court's calendar does not constitute impossibility, impracticability, or futility within the meaning of section 583.340. (Baccus v. Superior Court, supra, 207 Cal. App. 3d at p. 1532.)

Brandt cites no authority supporting the contention that mere settlement negotiations, which are very much a routine part of pretrial activities, constitute a period of impossibility, impracticability, or futility within the meaning of section 583.340. Indeed, it has long been established that: "Negotiations for settlement do not except an action

from the mandatory provisions of the [diligent prosecution] statute." (Berger v. McMahan (1953) 116 Cal. App. 2d 328, 331.) This holding remains effective and applicable here.

Malouf Bros. V. Dixon (1991) 230 Cal. App. 3d 280, dealt with a judgment to enforce a settlement agreement, which settlement was finalized within the five-year period. Malouf held that five-year rule does not apply where the parties have "stated a complete settlement in open court, [because] the court can assume the matter has indeed been finally disposed. Details of execution may remain, but it is reasonable to assume the matter will not go to trial." (Id. At p. 285; see also Gorman v. Holte (1985) 164 Cal. App. 3d 984 [holding that the diligent prosecution statute does not apply where parties stipulated to a complete settlement on the record in open court, and no issues to be

tried remained, because a final disposition had effectively been reached before the deadline].)

Clearly, this principle does not apply where, as here, the parties had not reached a binding and complete agreement. In short, there was no reasonable basis for an assumption that the case would not go to trial based upon the settlement discussions. Brandt merely extended an unaccepted, conditional offer of settlement. This cannot be construed as an impossible, impracticable, or futile situation under section 583.340, releasing plaintiff of the duty to bring the case to trial within five years.

C. Waiver/Estoppel Exception

Section 583.330 provides that parties may extend the five-year time limit by written stipulation or by oral agreement made in open court, if entered in the minutes of the court or a transcript is made.

Brandt contends that Gygax waived and/or is estopped from asserting the five-year statute because at the March 1, 1996, case management conference, Gygax acquiesced to a trial date past the five-year anniversary.

The waiver exception applies only where "clear and incontrovertible [sic] evidence" establishes that "`the statutory time was deliberately intended to be extended by both parties.'" (Bella Vista Dev. Co. V. Superior Court (1963) 223 Cal. App.2d 603,614) The case law holds that defendant's acquiescence during the court's setting of a trial date beyond the deadline does not preclude a dismissal under the diligent prosecution statute.

In Singelyn v. Superior Court (1976) 62 Cal. Pp. 3d 972, where the court set the trial date for one day beyond the five-year anniversary, "[defendant's] presence at the trial setting conference

did not constitute a barrier to their seeking dismissal under section 583, subdivision (b) [predecessor to section 583.310]...." (Id. At p. 974.) In Taylor v. Shultz (1978) 78 Cal. App. 3d 192 the issue was "whether the presence alone of all counsel at a pretrial or trial setting conference waives the requirement of a written stipulation (or oral stipulation recorded in the minutes) when the court sets a trial date after expiration of the five-year period.... We conclude that it does not." (Id. At p. 195) In Wright v. Groom Trucking Co. (1962) 206 Cal. App. 2d 485, defense counsel's presence at a pretrial conference at which the trial was set beyond the five-year anniversary did not constitute a stipulation to waive the five-year statute, even where each counsel declared to the court that the date was satisfactory.

In Wilcox v. Ford, supra, 206 Cal.

App. 3d 1170, defense counsel attended a trial setting conference at which plaintiff's counsel did not attend, and thereafter defense counsel failed to apprise plaintiff of the trial date set by the trial court beyond the five-year limit. The appellate court rejected plaintiff's arguments on waiver and estoppel grounds; dismissal under section 583.310 was upheld because plaintiff himself failed to make the minimal effort to determine the trial date. (Wilcox v. Ford, supra, at p. 1180.)

Thus, even when only the defendant is present and acquiesces in the court's setting of a date beyond the five years, plaintiff's waiver and estoppel arguments fail. (Wilcox v. Ford, supra, at p. 1180.) Where, as here, plaintiff is present at the court's setting of a trial date and acquiesces, or fails to object, plaintiff cannot rely on waiver or estoppel

theories. Defendant's mere acquiescence to the court's setting of a trial date beyond the five years cannot be construed as clear and incontrovertible evidence that the parties deliberately intended to extend the statutory period.

Plaintiffs shoulder the affirmative duty to make every reasonable effort to bring a case to trial within five years, even during the last month of its statutory life; defendants have no such duty. (Hill v. Bingham, supra, 181 Cal. App. 3 d at p. 10.) Brandt failed his duty to call to the attention of the court the necessity for setting the trial before the deadline set by section 583.310.

D. Mandatory Dismissal

Section 583.360 provides that: "(a) An action shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within

the time prescribed in this article. [¶] (b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute."

Unless some specified exception applies, a trial court has mandatory duty to dismiss an action, once five years has elapsed from the date the action was commenced. (M&R Properties v. Thomson (1992) 11 Cal. App. 4th 899, 903.)

Here, no exception applies, and trial court properly dismissed the action.

The judgment is affirmed.

_____

Reardon, J.

We concur:

_____

Anderson, P.J.

_____

Hanlon, J.

Smooth Minutes - Case Management Cont.

Superior Court of the State of

California, County of Alameda

Dept. 040 JOB RPT Page 1

2:00 p.m. Date: Jan. 12, 1996

William Dunbar

Judge

Wanda Boyns

Clerk

Lisa Imus

Reporter

TITLE AND NATURE OF PROCEEDINGS

H153813-3 DAMAGES CONTINUED FROM:

10/27/95

--PLAINTIFF(S)--

BRANDT, MARK

BRANDT, RACHEL

--ATTORNEY(S) APPEARING--

JOSEPH R. FARIA, JR.

--DEFENDANT(S)--

SWEESY, BEVERLY

GYGAX REALTOR

COURT, JACK

DOES 1 TO 20

--ATTORNEY(S) APPEARING--

MOTTA, RONALD

DENA M. KOERPEL DOUGLAS

DENA M. KOERPEL FREE

THERE IS --NO— COURT DATE IN THE FUTURE.

CASE MANAGEMENT CONFERENCE CONT'D FOR CMCC OR DISMISSAL.

COURT ORDERS $250 SANCTIONS AGAINST THE PLTFS PAYABLE TO COUNSEL FOR DEFT. PAYABLE WITHIN 10 DAYS FOR FAILURE TO PARTICIPATE AND MAKE THIS A MEANINGFUL COURT HEARING.

NUMBER OF PRIOR CMCC 4.

DISPOSITION

OF SIDES _____ EST LENGTH OF TRIAL _____ DAYS.

JURY DEMANDED BY: PLAINTIFF _____

DEFENDANT _____

JURY WAIVED BY: PLAINTIFF _____

DEFENDANT _____

DISCOVERY CLOSED AFTER ARB (CCP 1141.24):_____

DISCOVERY CLOSING DATE: _____

DEADLINE FOR DISCLOSURE OF EXPERTS_____

REF TO ARBITRATION. COMPLETE BY _____

FURTHER CMC ON 03/01/96 AT 9 A.M. DEPT 40

TRIAL DATE_____ AT _____DEPT_____

OTHER ORDERS:

CCMC, TSC OR DISMISSAL IF THE PLTF'S CONTINUE TO IGNORE COURT RULINGS

DEFT MAY FILE A MOTION TO REDUCE SETTLEMENT TO JUDGMENT.

WAS CONFERENCE HELD? YES ____ IF YES, WAS THERE APPARENT FULL SETTLEMENT?

YES(DS)_____ NO (NS)_____

SMOOTH MINUTES - LAW & MOTION

SUPERIOR COURT OF THE STATE OF

CALIFORNIA, COUNTY OF ALAMEDA

DEPT. 30 JOB RPT PAGE 1

9:30 A.M. DATE: FRI., JUN 21, 1996

JOHN F. KRAETZER

JUDGE

BEVERLY REITSMA

CLERK

C. THROWER/ER

REPORTER

TITLE AND NATURE OF PROCEEDINGS

2 H153813-3 DAMAGES CONT'D FROM:

06/05/96

--PLAINTIFF(S)--

BRANDT, MARK

BRANDT, RACHEL

--ATTORNEY(S) APPEARING--

JOSEPH R. FARIA, JR.

--DEFENDANT(S)--

SWEESY, BEVERLY

GYGAX REALTOR

COURT, JACK

DOES 1 TO 20

--ATTORNEY(S) APPEARING--

MOTTA, RONALD

DENA M. KOERPEL

DENA M. KOERPEL

DOUGLAS FREE

FUTURE CT DATES: 07/12/96:NJT

MOTION TO DISMISS (DEFTS GYGAX REALTOR & JACK COURT)

NUMBER OF PRIOR L&M 0

DISPOSITION

( ) DROPPED FROM CALENDAR

( ) CONTINUED TO _____ AT _____AM/PM

IN DEPT _____ FOR _____

Counsel appearing, the matter is argued and submitted, the court orders:

Defendant Gygax Realty and Jack Court's motion to dismiss the complaint for failure to bring the case to trial within five years, pursuant to CCP Section 583.360 is granted.

ENDORSED FILED; ALAMEDA COUNTY, SEPT.10, 1996, RONALD G. OVERHOLT, Exec. Off./Clerk, By: Sara Dallesko

GEORGE J. ZISER, State Bar No. 051879
DOUGLAS S. FREE, State Bar No. 157188
LARSON & BURNHAM
A Professional Corporation
P.O. Box 119
Oakland, CA 94604
Telephone: (510) 444-6800
Facsimile: (510) 835-6666
Attorneys for Defendants GYGAX REALTOR and JACK COURT

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

MARK BRANDT AND RACHEL BRANDT

Plaintiffs,

v.

BEVERLY SWEESY, et al.

Defendants.

NO. H153813-3

ORDER GRANTING DEFENDANTS' MOTION TO DETERMINE PREVAILING PARTY AND TO FIX AMOUNT ATTORNEY'S FEES AWARDED AS COSTS

DATE:

TIME:

DEPT:

On August 29, 1996, the motion of defendants Gygax Realtor and Jack Court for an order determining the prevailing party and fixing the amount of attorney's fees awarded as costs came on for a regularly scheduled hearing. The court, having considered the moving and opposition papers, as well as the evidence presented at the hearing on defendants' motion,

HEREBY ORDERS THAT defendants Gygax Realtor and Jack Court be adjudged the prevailing parties in the above-captioned matter, and that defendants are entitled

to recover attorney's fees and costs in the amount of $33, 815.50 from plaintiffs Mark and Rachel Brandt in accordance with the provisions of the purchase and sale agreement out of which the above-captioned litigation arose.

DATED: August 29, 1996

_____

JUDGE OF THE SUPERIOR COURT

Smooth Minutes - Case Management Cont.

Superior Court of the State of

California, County of Alameda

Dept. 040 JOB RPT Page 1

TITLE AND NATURE OF PROCEEDINGS

H153813-3 DAMAGES CONTINUED FROM: 01/12/96

--PLAINTIFF(S)--

BRANDT, MARK

BRANDT, RACHEL

--ATTORNEY(S) APPEARING--

JOSEPH R. FARIA, JR.

--DEFENDANT(S)--

SWEESY, BEVERLY

GYGAX REALTOR

COURT, JACK

DOES 1 TO 20

--ATTORNEY(S) APPEARING--

MOTTA, RONALD

DENA M. KOERPEL DOUGLAS

DENA M. KOERPEL FREE

THERE IS --NO— COURT DATE IN THE FUTURE.

CASE MANAGEMENT CONFERENCE CONT'D

NUMBER OF PRIOR CMCC 5.

DISPOSITION

OF SIDES __2__ EST LENGTH OF TRIAL __3__ DAYS.

JURY DEMANDED BY: PLAINTIFF _____

DEFENDANT _____

JURY WAIVED BY: PLAINTIFF ___X___

DEFENDANT __X__

DISCOVERY CLOSED AFTER ARB (CCP 1141.24):_____

DISCOVERY CLOSING DATE: _____

DEADLINE FOR DISCLOSURE OF EXPERTS_____

REF TO ARBITRATION. COMPLETE BY _____

FURTHER CMC ON 05/10/96 AT 2:30P.M.DEPT 40

TRIAL DATE 07/12/96 AT 9 A.M.

DEPT 30

OTHER ORDERS:

[CCMC, TMC]

NOTICE IS WAIVED

WAS CONFERENCE HELD? YES X IF YES,

WAS THERE APPARENT FULL SETTLEMENT?

YES(DS) _____ NO (NS) X

FILED, Court of Appeal, Aug. 19, 1997, Ron D. Barrow, Clerk, By:

FILED; ALAMEDA COUNTY, AUG. 22, 1997,

CLERK OF THE SUPERIOR COURT, By:

CALIFORNIA COURT OF APPEAL

FIRST APPELLATE DISTRICT

DIVISION 4

MARK BRANDT AND RACHEL BRANDT,

Plaintiffs and Appellants,

v.

BEVERLY SWEESY, et al.,

Defendants and Respondents.

A075317

Alameda County Super. Ct. No. H1538133

BY THE COURT:

The petition for rehearing is denied.

SUPREME COURT, FILED, OCT. 1, 1997, Robert Wandruff Clerk.

First Appellate District Four, No. A075317/A076285 S064014

IN THE SUPREME COURT OF CALIFORNIA

MARK BRANDT Et Al., Appellants

v.

GYGAX REALTOR Et Al., Respondents

Petition for review DENIED.

_____

Chief Justice

ENDORSED FILED; ALAMEDA COUNTY, JAN.11, 1996 RONALD G. OVERHOLT, Exec. Off./Clerk By Wanda Boyns

Rachel Martinez-Brandt
Mark F. Brandt
c/o 37192 Oak Street
Fremont, CA 94536
in Propria Persona, Sui Juris

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA - SOUTHERN DIVISION

RACHEL MARTINEZ-BRANDT, and
MARK BRANDT
Plaintiffs,

BEVERLY SWEESY
and DOES 1 to 20,
Defendants

CASE NO. H153813-3

NOTICE OF INTENT

TO INVOKE

CONSTITUTIONAL

RIGHTS

DATE:January 12,1996

PLACE: HAYWARD, CA

DEPT.: 40

TIME: 2:00 P.M.

May it please the court that on January 12, 1996, before the honorable Judge Dunbar, at Hayward, California that Rachel Martinez-Brandt and Mark Brandt will request that they be granted a trial date for Superior Court Case #153813-3 pursuant to Amendment VII of the Constitution of the United States of America.

Dated: January 10, 1996

By: s./Rachel Martinez-Brandt

By: s./Mark Brandt

RECEIVED, JAN. 22, 1996, LARSON & BURNHAM

ENDORSED FILED; ALAMEDA COUNTY, JAN.11, 1996, RONALD G. OVERHOLT, Exec. Off./Clerk By Wanda Boyns

Rachel Martinez - Brandt
Mark F. Brandt
c/o 37192 Oak Street
Fremont, CA 94536
In Propria Persona, Sui Juris

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA - SOUTHERN DIVISION

RACHEL MARTINEZ-BRANDT, and
MARK BRANDT
Plaintiffs,

BEVERLY SWEESY
and DOES 1 to 20
Defendants.

CASE NO. H153813-3

AFFIDAVIT IN SUPPORT OF

INTENT TO INVOKE

CONSTITUTIONAL RIGHTS

DATE: January 12, 1996

PLACE: HAYWARD, CA

DEPT.: 40

We, Rachel Martinez-Brandt and Mark Brandt, do hereby solemnly affirm that we agreed to purchase the real property and residence located at 37192 Oak Street, Fremont, California in accordance with the terms, conditions, and disclosures set forth in a written contract between ourselves and Beverly Sweesy with Jack Court and Ann Wilson acting as real estate agents while employed at Gygax Realty of Fremont, California. Upon our initial date of moving in during late August of 1990. We became aware of structural modifications of the original construction which were not properly done and were

defective. We later learned that this work was done without permits and it does not comply with building codes. The house also has electrical code violations, and contains asbestos materials, including asbestos materials in the kitchen cabinets and drawers where we keep our dishes silverware. We initiated legal action February of 1991 and to date we have spent over $10,000 for legal fees, inspections, engineering work and drafting work pursuant to this case. This has been a great financial and emotional hardship on ourselves and two boys we have been blessed with since we moved into this house.

Upon examining the depositions of Beverly Sweesy and Ann Wilson we have noted they have lied under oath and misrepresented facts concerning this case.

We therefore request that we be granted a trial pursuant to Amendment VII

of the Constitution of the United States of America to resolve this matter in which the value in controversy does exceed twenty dollars.

Dated: January 10, 1996

Sworn to By:

s./Rachel Martinez-Brandt

s./Mark Brandt

Signature witnessed at San Jose, California on January 10, 1996

By:

s./Rosemary Mazzella

s./Frank Mazzella

ENDORSED FILED; ALAMEDA COUNTY, JAN. 11, 1996, RONALD G. OVERHOLT, Exec. Off./Clerk By Wanda Boyns

Rachel Martinez-Brandt
Mark F. Brandt
c/o 37192 Oak Street
Fremont, CA 94536
In Propria Persona, Sui Juris

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA - SOUTHERN DIVISION

RACHEL MARTINEZ-BRANDT, and
MARK BRANDT
Plaintiffs,

BEVERLY SWEESY
and DOES 1 to 20,
Defendants.

CASE NO. H153813-3

PONITS AND AUTHORITIES

IN SUPPORT OF INTENT

TO INVOKE CONSTITUTIONAL

RIGHTS

DATE: January 12, 1996

PLACE: HAYWARD, CA

DEPT.: 40

We site the following points and authorities in support of our intent to invoke our Constitutional Rights.

Constitution of the United States of America Amendment VII.

MARBURY V. MADISON 5 U.S. 137,174,176

MIRANDA V. ARIZONA 384 U.S. 436,491

NORTON V. SHELBY COUNTY 118 U.S. 425,442

OWEN V. INDEPENDENCE 100 S.C.R. 1398

RECEIVED, JAN.22, 1996, LARSON & BURNHAM

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA BEFORE THE HONORABLE WILLIAM DUNBAR, JUDGE - DEPARTMENT NO. 40

---OOO---

MARK BRANDT AND
RACHEL BRANDT,

PLAINTIFFS,

VS. NO. H-153813-3

BEVERLY SWEESY,

DEFENDANT.

_____/

REPORTER'S TRANSCRIPT OF PROCEEDINGS

FRIDAY, JANUARY 12, 1996

APPEARANCES

FOR THE PLAINTIFF: MARK BRANDT
IN PROPRIA PERSONA
JOSEPH FARIA, ESQ.
ADVISOR

FOR THE DEFENDANT: DOUGLASS FREE
ATTORNEY AT LAW

FRIDAY, JANUARY 12, 1996, P.M. SESSION

PROCEEDINGS

---OOO---

THE COURT: THIS IS THE ACTION OF BRANDT AND MARTINEZ-BRANDT, B-R-A-N-D-T, VERSUS SWEESY, S-W-E-E-S-Y, ACTION H-153813-3.

THE RECORD SHOWS THAT RACHEL MARTINEZ-BRANDT AND MARK F. BRANDT ARE APPEARING IN PROPRIA PERSONA REPRESENTING THEMSELVES IN THIS ACTION. MR. JOSEPH FARIA IS HERE AS AN ATTORNEY, PRESUMABLY AS AN ADVISOR. HE'S NOT YET BECOME AN ATTORNEY OF RECORD, ALTHOUGH HE APPEARS IN THE FILE, IN AN EARLIER TIME, AS ATTORNEY FOR THE PLAINTIFFS.

MR. FARIA: THAT'S RIGHT, YOUR HONOR.

THE COURT: WITH THE MOST RECENT DOCUMENTS RECEIVED FROM THE PLAINTIFFS INDICATE THAT THEY ARE REPRESENTING THEMSELVES.

ON BEHALF OF THE DEFENDANT IS DOUG FREE, F-R-E-E.

MR. FARIA, YOUR CLIENT PRESENTED TO THE COURT YET A DOCUMENT ENTITLED NOTICE OF INTENT TO INVOKE CONSTITUTIONAL RIGHTS, POINTS AND AUTHORITIES IN SUPPORT OF INTENT TO INVOKE CONSTITUTIONAL RIGHTS, WHICH GOES BACK IN ITS CASE CITATIONS QUITE SOME TIME.

MR. FARIA: I NOTICED.

THE COURT: MARBERY (PHONETIC) VERSUS MADISON (PHONETIC) IS THE FIRST CASE CITED.

MR. FARIA: I DID NOT HAVE A COPY OF THOSE DOCUMENTS. I WASN'T AWARE THIS HAD BEEN FILED WITH THE COURT UNTIL THIS AFTERNOON WHEN I ARRIVED.

THE COURT: AND HE HAS ALSO PRESENTED AND I HAVE RECEIVED AN AFFIDAVIT IN SUPPORT OF INTENT TO INVOKE CONSTITUTIONAL RIGHTS.

MR. FARIA: FIRST --

THE CLERK: EXCUSE ME FOR INTERRUPTING.

(PAUSE)

THE COURT: OKAY. SOMEONE WANTED TO SAY SOMETHING.

MR. FARIA: I WAS JUST INDICATING THAT I HAVE NOT SEEN ANY OF THOSE DOCUMENTS UNTIL TODAY.

THE COURT: I DON'T THINK IT'S PARTICULARLY CRITICAL TO THIS ISSUE.

MR. FARIA: I DIDN'T THINK THEY WERE, JUDGE.

THE COURT: THE MATTER IS ON THE CALENDAR FOR TRIAL SETTING CONFERENCE, CASE MANAGEMENT CONFERENCE OR DISMISSAL OF THE ACTION.

MY NOTES FOR EARLIER MEETINGS OF AUGUST AND OCTOBER INDICATE THAT AS OF OCTOBER 27, 1995, PLANS HAVE BEEN SUBMITTED TO THE CITY OF FREMONT FOR APPROVAL AND WHEN APPROVED THEY WERE TO GO TO BID.

MR. FARIA: THAT'S CORRECT, YOUR HONOR.

THE COURT: WHAT'S HAPPENED?

MR. FARIA: WHAT'S HAPPENED, YOUR HONOR, IS THE PLANS WERE SUBMITTED TO THE CITY OF FREMONT, AND THEY HAVE CERTAIN REVIEW CORRECTIONS THAT MUST BE MADE TO THEM BEFORE THEY COULD BE APPROVED.

WE HAVE A TWO PAGE DOCUMENT FROM THE DEVELOPMENT OF ENVIRONMENT SERVICES DEPARTMENT AND THOSE THAT HAVE TO BE ATTENDED TO: ONE, ISSUE UNDER NON-INSTRUCTIONAL COMMENTS; TWO, IDENTIFICATION OF WHETHER OR NOT THE LIVING SPACE — THE REQUIREMENTS FOR THE CEILING WOULD BE 70 FEET INCHES, WHICH WOULD REQUIRE ADJUSTING THE ROOF LINE OF THE HOUSE. THE BUILDING PLANS INDICATE 70 INCH CEILING HEIGHT AND USE OF SPACE ONLY, UTILITY ROOM, SUCH AS -

THE COURT: DON'T TALK SO FAST MR. FARIA.

MR. FARIA: SORRY. YEAH.

MR. FREE: YOUR HONOR?

THE COURT: YES MR. FREE.

MR. FREE: I THINK MY CLIENTS AND I HAVE BEEN KEPT IN THE DARK ON THIS. I HAVE BEEN WRITING TO MR. FARIA SINCE OCTOBER. I'VE WRITTEN SEVERAL LETTERS, MADE NUMEROUS TELEPHONE CALLS, TRIED TO OBTAIN THESE PLANS SO I COULD IN THE MEANTIME DISCUSS THEM WITH MY CLIENT'S EXPERT IN ORDER TO MAKE TODAY'S PROCEEDINGS MORE MEANINGFUL. I JUST RECEIVED THE PLANS PERHAPS 20 MINUTES AGO AND I'M REALLY UNABLE TO COMMENT ON THEIR CONTENT.

MR. FARIA: I GOT THEM TWO DAYS AGO, JUDGE. AND THEY'VE BEEN IN PLAIN REVIEW. WE JUST GOT OUR COPIES TWO DAYS AGO. THE ONE I PROVIDED TODAY AS WELL.

THE COURT: WELL, AS FAR AS I COULD TELL, YOUR CLIENT DOESN'T KNOW ANY MORE WHAT HE'S TALKING ABOUT IN THE LAW AS HE DOES ABOUT SOME OF THE HOUSE THINGS. THE

DOCUMENTS THAT HE'S OFFERED, HE HASN'T FILED, I HAVEN'T ACCEPTED THEM FOR FILING, BUT I'VE RECEIVED THEM. HE WANTS A TRIAL DATE PURSUANT TO THE SEVENTH AMENDMENT OF THE U.S. CONSTITUTION. NOW I DON'T KNOW WHAT THE HELL HE'S TALKING ABOUT AND NEITHER DOES HE.

THE PLAIN FACT IS HE HAS FAILED, ABSOLUTELY FAILED TO COOPERATE WITH THIS COURT, AND HE DOESN'T KNOW WHAT HE'S DOING FROM A LEGAL STANDPOINT, AND HE IS OBSTRUCTING THE PROCESS OF JUSTICE IN THIS COURT, AND THEN HE THROWS ME SOME PAPERS TO TALK ABOUT HIS CONSTITUTIONAL RIGHTS. I'M NOT TRYING TO DENY HIM ANY CONSTITUTIONAL RIGHTS, BUT I AM INSISTING HE DO JUST WHAT EVERYBODY ELSE DOES IN THIS COURT AND THAT IS COMPLY WITH ITS ORDERS, INCLUDING THOSE WHICH REQUIRE CASE MANAGEMENT STATEMENTS AND COOPERATION.

THE VERY LEAST I'M GOING TO DO IS GRANT - CONSIDER GRANTING A CONTINUANCE OF

TODAY WITH SANCTIONS AGAINST THE PLAINTIFF AND AWARD IT TO THE DEFENDANT FOR THE FAILURE TO MAKE THIS A MEANINGFUL MEETING.

MR. FREE: YOUR HONOR, I HAVE JUST ALSO BEEN APPRISED TODAY ABOUT WHEN THIS DOCUMENT WAS FILED, I GUESS YESTERDAY. I HAVE NOT RECEIVED A COPY YET.

THE COURT: IT WASN'T SERVED ON YOU AND IT WASN'T FILED. I JUST MARKED IT RECEIVED. IT WASN'T FILED.

MR. FREE: MY CONCERN, YOUR HONOR, IT'S MY UNDERSTANDING, BASED ON WHAT HAPPENED PREVIOUSLY IN THIS CASE, WE HAVE REACHED BEFORE THE COURT A CONDITIONAL SETTLEMENT THAT HAS YET TO COME TO FRUITION. IT'S MY CLIENT'S INTENTION TO HOLD MR. BRANDT AND HIS WIFE TO THAT CONDITIONAL SETTLEMENT. I DON'T KNOW WHEN THIS BIT ABOUT WANTING A JURY TRIAL AT THIS POINT IS. WE HAVE NOT EXHAUSTED THE SETTLEMENT.

THE COURT: WELL, YOU'D HAVE TO FILE A

MOTION TO COMPEL THE SETTLEMENT TO BE REDUCED TO JUDGMENT, AND WE MAY DO THAT, BUT IN THE MEANTIME WHAT ELSE ARE WE GOING TO DO TODAY? CONTINUE IT?

MR. FREE: I SUPPOSE THAT'S THE BEST THING TO DO. I COULD SHOW THESE PLANS TO MY CLIENT'S EXPERT FOR WHAT THEY'RE WORTH.

MR. FARIA: WE CAN CALL THE CITY PEOPLE WHO REVIEWED THEM AND DIRECTLY FIND OUT WHAT-

MR. FREE: AS I MENTIONED TO THE COURT, I JUST SEEN THESE FOR THE FIRST TIME.

THE COURT : WHAT IS THE CONVENIENCE OF THE DEFENDANT AND ATTORNEY LATE FEBRUARY, EARLY MARCH?

MR. FREE: I WOULD PREFER LATE FEBRUARY.

THE COURT: HOW ABOUT FRIDAY, MARCH 1ST IN THE MORNING?

MR. FREE: THAT'LL BE FINE YOUR HONOR.

THE COURT: 9:00 O'CLOCK ON FRIDAY,

MARCH 1, 1996, IN THIS DEPARTMENT FOR FURTHER CASE MANAGEMENT CONFERENCE, TRIAL SETTING CONFERENCE OR DISMISSAL IF THE PLAINTIFF CONTINUES TO FAIL TO COMPLY WITH THE COURT'S RULES.

AND FOR MAKING THIS PROCESS TODAY USELESS BOTH TO THE COURT AND COUNSEL, THE PLAINTIFFS ARE ASSESSED $250 IN SANCTIONS TO BE PAYABLE WITHIN 10 DAYS. THAT MONEY IS TO BE PAID TO THE DEFENDANT'S COUNSEL.

MR. BRANDT: TO WHO, YOUR HONOR, EXCUSE ME?

THE COURT: DEFENDANT'S COUNSEL.

MR. FARIA: THE FIRM AS OPPOSED TO MR. FREE PARTICULARLY?

THE COURT: YES.

THE COURT: THANK YOU.

MR. FREE: THANK YOU, YOUR HONOR.

MR. FARIA: THANK YOU.

RECEIPT: From Larsen & Burnham

DATE: January 22, 1996

RECEIVED FROM: Mark Brandt

FOR: Brandt vs. Sweesy - Free

CHECK: $250.00

STATE OF CALIFORNIA)

) SS

COUNTY OF ALAMEDA)

I, LISA IMUS, A CERTIFIED SHORTHAND REPORTER, DO HEREBY CERTIFY THAT THE FOREGOING IS A FULL, TRUE AND ACCURATE TRANSCRIPT OF MY SHORTHAND NOTES TAKEN OF THE AFOREMENTIONED PROCEEDINGS AT THE TIME AND PLACE THEREIN INDICATED.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND THIS MARCH 12, 1996.

_____

LISA IMUS, CSR #7195

To:

Lisa Imus

Court Reporter

1225 Fallon St.

Dept. 3

Oakland, CA

Dear Lisa,

This letter is a request to obtain a certified transcript of a proceeding held at Superior Court of California, Southern Division, 24405 Amador St., Hayward, CA on January 12th, 1996 in Dept. 40. The case number is H153813-3, the case name is Brandt vs. Sweesy. There were appearances by Douglas Free for the defendants, Mark Brandt and Joseph Faria for the Plaintiffs, and Judge Dunbar was presiding. I would appreciate it if you would call me when it is prepared. I am enclosing a check (#1382) of $30.00 for a

deposit as we had discussed on the phone.

Thank You,

s./Mark Brandt

(510) 793-2528

CHECK:

Pay to the order of: Lisa Imus

Date: Jan. 16, 1996

Amount: $30.00

Check Number: 1382

FILED; ALAMEDA COUNTY, APR.25, 1996, RONALD G. OVERHOLT, Exec. Off./Clerk, By S./Wanda Boyns

Rachel Martinez - Brandt
Mark F. Brandt
c/o 37192 Oak Street
Fremont, CA 94536
In Propria Persona, Sui Juris

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA - SOUTHERN DIVISION

RACHEL MARTINEZ-BRANDT, and MARK BRANDT
Plaintiffs,

BEVERLY SWEESY
and DOES 1 to 20,
Defendants.
_____/

CASE NO. H153813-3

NOTICE OF INTENT

TO INVOKE CONSTITUTIONAL RIGHTS

DATE: January 12, 1996

PLACE: HAYWARD, CA

DEPT: 40

TIME: 2 p.m.

May it please the court that on January 12, 1996, before the honorable Judge Dunbar, at Hayward, California the Rachel Martinez-Brandt and Mark Brandt will request that they be granted a trial date for Superior Court Case #153813-3 pursuant to Amendment VII of the Constitution of the United States of America.

Dated: January 10, 1996

By: s./ Rachel Martinez-Brandt

By: s./ Mark Brandt

RECEIVED, JAN.11, 1996, RONALD G. OVERHOLT, Exec. Off./Clerk By: Wanda Boyns. Deputy

FILED; ALAMEDA COUNTY, APR. 25, 1996, RONALD G. OVERHOLT, Exec. Off./Clerk, By: s./Wanda Boyns

Rachel Martinez - Brandt
Mark F. Brandt
c/o 37192 Oak Street
Fremont, CA 94536
In Propria Persona, Sui Juris

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA - SOUTHERN DIVISION

RACHEL MARTINEZ-BRANDT, and
MARK BRANDT
Plaintiffs,

BEVERLY SWEESY
and DOES 1 to 20,
Defendants.

_____/

CASE NO. H153813-3

AFFIDAVIT IN SUPPORT OF INTENT TO INVOKE CONSTITUTIONAL RIGHTS

DATE: January 12, 1996

PLACE: HAYWARD, CA

DEPT.: 40

We, Rachel Martinez - Brandt and Mark Brandt, do hereby solemnly affirm that we agreed to purchase the real property and residence located at 37192 Oak Street, Fremont, California in accordance with the terms, conditions, and disclosures set forth in a written contract between ourselves and Beverly Sweesy with Jack Court and Ann Wilson acting as Real Estate Agents while employed at Gygax Realty of Fremont, California. Upon our initial date of moving in during late August of 1990 we became aware of structural modifications to the original construction which were not properly done and were defective. We later learned that this work was done

without permits and it does not comply with building codes. The house also has electrical code violations, plumbing code violations, and contains asbestos materials, including asbestos materials in the kitchen cabinets and drawers where we keep our dishes silverware. We initiated legal action February of 1991 and to date we have spent over $10,000 for legal fees, inspections, engineering work and drafting work pursuant to this case. This has been a great financial and emotional hardship on ourselves and the two boys we have been blessed with since we moved into this house.

Upon examining the depositions of Beverly Sweesy and Ann Wilson we have noted they have lied under oath and misrepresented facts concerning this case.

We therefore request that we be granted a trial pursuant to Amendment VII of the Constitution of the United States

of America to resolve this matter in which the value in controversy does exceed twenty dollars.

Dated: January 10, 1996

Sworn to By:

s./ Rachel Martinez-Brandt

s./ Mark Bradnt

Signature witnessed at San Jose, California on January 10, 1996

By:

s./ Rosemary Mazzella

s./ Frank Mazzella

RECEIVED, JAN. 11, 1996, RONALD G. OVERHOLT, Exec.Off./Clerk, By: Wanda Boyns. Deputy.

FILED; ALAMEDA COUNTY, APR. 25, 1996, RONALD G. OVERHOLT, Exec. Off./Clerk, By: s./Wanda Boyns

Rachel Martinez-Brandt
Mark F. Brandt
c/o 37192 Oak Street
Fremont, CA 94536
In Propria Persona, Sui Juris

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA - SOUTHERN DIVISION

RACHEL MARTINEZ-BRANDT, and
MARK BRANDT
Plaintiffs,

BEVERLY SWEESY
and DOES 1 to 20,
Defendants.

CASE NO. H153813-3

PONITS AND AUTHORITIES

IN SUPPORT OF INTENT

TO INVOKE CONSTITUTIONAL

RIGHTS

DATE: January 12, 1996

PLACE: HAYWARD, CA

DEPT.: 40

We site the following points and authorities in support of our intent to invoke our Constitutional Rights.

Constitution of the United States of America Amendment VII.

MARBURY V. MADISON 5 U.S. 137,174,176

MIRANDA V. ARIZONA 384 U.S. 436,491

NORTON V. SHELBY COUNTY 118 U.S. 425,442

OWEN V. INDEPENDENCE 100 S.C.R. 1398

RECEIVED, JAN. 11, 1996, RONALD G. OVERHOLT, Exec. Off./Clerk, By: Wanda Boyns. Deputy.

ENDORSED FILED; ALAMEDA COUNTY, NOV.7, 1997, RONALD G. OVERHOLT, Exec. Off./Clerk, By:

JOSEPH R. FARIA, JR., ESQ. (61083)
BELL, FARIA & BELL
A Professional Corporation
43213 Mission Boulevard
Fremont, California 94539
Telephone: 510/651-7000
Attorney for Plaintiffs
MARK AND RACHEL BRANDT

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA - SOUTHERN DIVISION

MARK BRANDT and
RACHEL BRANDT,
Plaintiffs,
v.
BEVERLY SWEESY,
Defendants.
Case No. H 153813-3

DECLARATION OF JOSEPH R. FARIA JR.

Now comes JOSEPH R. FARIA JR. And declares as follows:

I am the attorney for Mark and Rachel Brandt, plaintiffs in Brandt v. Sweesy, et al., Alameda County Superior Court Case No. H 153813-3. During the case management phase of this case, Judge William Dunbar exhibited a strong dislike for my client Mark Brandt which affected the way he treated Mr. Brandt and this case.

I declare under penalty of perjury, pursuant to the laws of the State of California, that the foregoing is true and correct.

Executed November 4, 1997, at Fremont, California.

s./Joseph R. Faria